

Supplemental Environmental Projects Policy Fact Sheet

What a SEP is:

- A SEP is an environmentally beneficial project that is proposed by a defendant to be included as additional injunctive relief in an enforcement settlement.
- A SEP is voluntary – it cannot be required or compelled by EPA.
- A SEP is developed and implemented by a settling defendant using its own funds.
- A SEP is included in a settlement only if a defendant is interested in the project and it meets the legal and other criteria contained in EPA's SEP Policy.

What a SEP is not:

- A SEP is not a payment of money to a third party in lieu of penalties.
- A SEP cannot augment or supplement EPA's or another government agency's budget or program.
- A SEP cannot be directed, controlled, or managed by EPA.
- A SEP cannot be undertaken using federal loans, federal contracts, federal grants, or any other form of federal financial assistance or other federally-provided assistance.

Fundamentals of SEPs:

- In any negotiated enforcement settlement, initial penalty calculations may be adjusted for a variety of reasons, such as self-disclosure, cooperation, and a good faith effort to comply. At this point in negotiations, a defendant may propose a SEP to mitigate the initial penalty.
- Because performance of a SEP provides additional public health or environmental benefits as part of the settlement, the initial penalty may be adjusted downwards in recognition of the health or environmental benefits of the project, and the defendant's willingness to perform the additional work as part of the settlement.
- To ensure that EPA is appropriately exercising its enforcement discretion, to be included in a settlement a defendant's proposed project must meet a variety of legal requirements, including that there is a nexus, or connection, to the violation being resolved and the goals of the underlying statute, and compliance with federal "anti-augmentation" laws (Miscellaneous Receipts Act and the Anti-Deficiency Act), as well as opinions of the Comptroller General and applicable caselaw.
- Settlements with SEPs always include a final settlement penalty amount that retains its deterrent value – specifically, an amount that reflects the gravity or seriousness of the violation, and that recoups the unfair economic advantage that the defendant obtained over its law-abiding competitors in order to maintain a level playing field for those who remained in compliance.

SEP Statistics at a Glance

Over the three-year period from FY2014 through FY2016, a total of 31 civil judicial settlements included Supplemental Environmental Projects (“SEPs”), with a total dollar value of \$45.42 million. Over this same period of time, 301 administrative settlements included SEPs, with a total dollar value of \$42.35 million. Only a fraction of all settlements include SEPs, averaging 7.4% over the last three-year period.

The most common type of projects performed by settling defendants are to provide emergency response equipment to local fire departments and first responders, in settlement of EPCRA and RCRA cases involving hazardous wastes. Providing blood lead level testing for children or performing lead abatement projects in housing are often seen as SEPs in lead renovation and repair cases under TSCA. Other commonly-seen projects include those where companies modify production or other facility processes to reduce the amount of potentially toxic chemicals used or the amount of pollutants discharged (which can save the company pollution control and waste disposal costs). Recent CWA cases with municipalities to improve their wastewater infrastructure have included SEPs for the repair or replacement of lateral sewer lines serving residential communities.

The detailed per-year breakdown for all SEPs from FY2014 through FY2016 is shown in the charts and graphs below.

Breakdown of Judicial and Administrative Cases with SEPs:

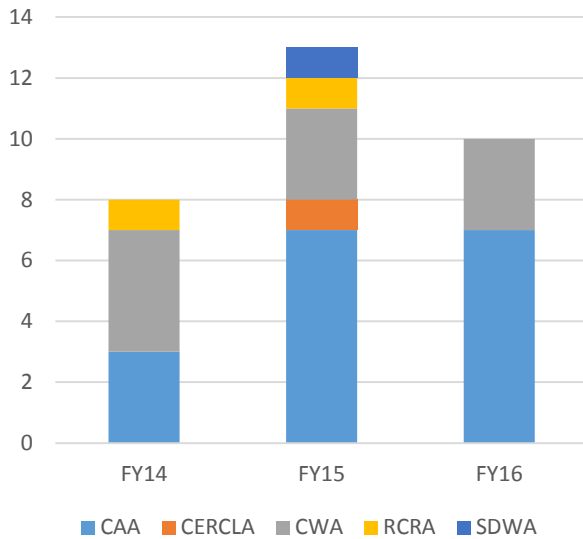
	Number of Judicial Cases w/SEPs	Average SEP Value (Judicial)	Number of Admin Cases w/SEPs	Avg SEP Value (Admin)	Percentage of all Cases w/SEPs
FY14	8	\$1.014M	94	\$85,770	6.9%
FY15	13	\$1.593M	110	\$113,417	8.1%
FY16	10	\$1.078M	97	\$198,620	7.2%
3-year Avg	10.3	\$1.297M	100.3	\$133,204	7.4%

Breakdown of Number of SEPs by Statute (all cases):

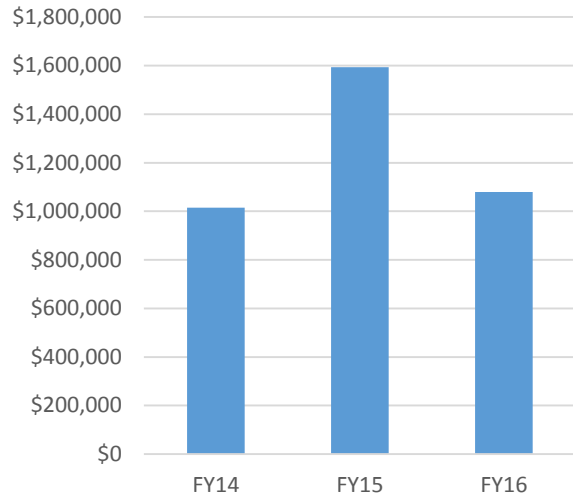
	CAA (non-112(r))	CAA 112(r)	CERCLA	CWA	EPCRA	FIFRA	MPRSA	RCRA	SDWA	TSCA	TOTAL
FY14	12	18	0	20	28	0	0	12	0	12	102
FY15	23	27	1	14	37	1	0	9	1	10	123
FY16	20	17	0	21	26	1	1	16	2	3	107
TOTAL	55	62	1	55	91	2	1	37	3	25	332

SEP Statistics at a Glance

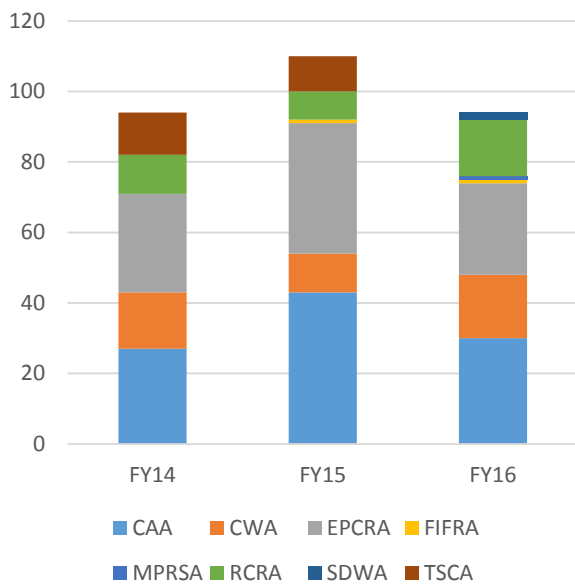
Civil Judicial Settlements with SEPs



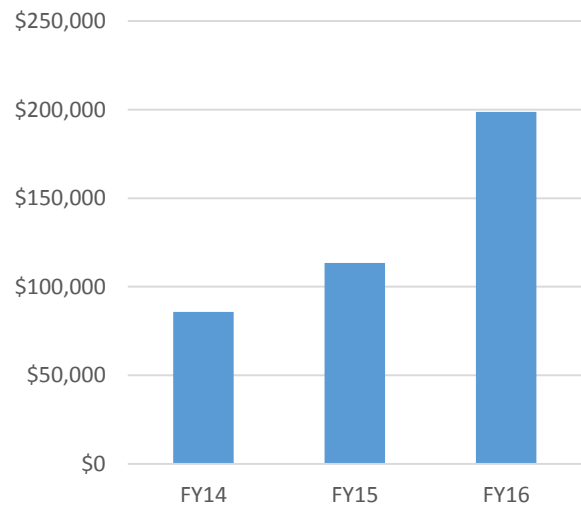
Average SEP Value (Judicial)



Administrative Settlements with SEPs



Average SEP Value (Administrative)



Civil Judicial Settlement for the Kappa Landfill (*United States v. City and County of Honolulu, Hawaii*)

This follows up on questions raised during the 1/26 discussion of SEPs regarding the project agreed to with Honolulu in the civil judicial settlement for the Kappa Landfill (*United States v. City and County of Honolulu, Hawaii*) to spend \$16 million to install and operate a 3-megawatt solar energy project at the Kappa Landfill's waste-to-energy facility.

Background:

Honolulu's Kappa Landfill violated Clean Air Act Sections 111 (Standards of Performance for New Stationary Sources, or "NSPS") and 112 (National Emission Standards for Hazardous Air Pollutants, or "NESHAP") by failing to, *inter alia*, install and operate required emission controls (a gas collection and control system), to develop a plan to control emissions during periods of startup, shutdown and malfunction, and to apply for a Title V permit, among other violations. These violations resulted in excess emissions of hazardous air pollutants ("HAPs") and volatile organic compounds ("VOCs"). An enforcement action was taken to bring the landfill back into compliance with these Clean Air Act requirements. Under the settlement, the Kappa Landfill would install required controls and take other measures to return to compliance with the Clean Air Act, pay a civil penalty of \$875,000, and implement the \$16 million SEP.

Questions on SEP:

One question presented during the 1/26 discussion concerned the "nexus" between the excess emissions of hazardous and other air pollutants and the solar energy SEP. "Nexus" is a legal requirement for SEPs, and is defined as "the relationship between the violation and the proposed project. Nexus ensures the proper exercise of the EPA's prosecutorial discretion and enables appropriate penalty mitigation for including the SEP in the settlement."¹ As explained in the "Legal Requirements" section of the SEP Policy, in order to establish nexus, the project must advance the objectives of the environmental statute that is the basis of the enforcement action, and "relate to the underlying violation(s) at issue."² The SEP Policy further explains that in order to relate to the underlying violations at issue in a case, the SEP project must be designed to reduce: (a) the likelihood that similar violations will occur in the future; or (b) the adverse impact to health or the environment to which the violation at issue contributes; or (c) the overall risk to health or the environment potentially affected by the defendant's violations.³

In this case, nexus is based on the reduction of both the adverse impact to health and the environment from the excess emissions of VOCs and HAPs, and the overall risk to health and the environment. VOCs and HAPs contribute to, among other things, the formation of ground-level ozone.⁴ The installation of a 3 MW solar power system at the landfill's waste-to-energy facility will generate approximately 5,000 megawatt hours of energy each year, thereby reducing emissions of nitrogen oxides ("NOx") and other combustion-based pollutants. Like HAPs and VOCs, NOx also contributes to the formation of ground-level ozone, and by reducing the amount of NOx produced at the landfill the SEP reduces the adverse effects from the excess emissions of HAPs and VOCs. Similarly, the reductions in ozone-causing

¹ SEP Policy, § IV.A.1, at 7.

² *Id.* § IV.A.2 & 3, at 8.

³ *Id.* The SEP Policy also requires a "geographic" nexus, specifying that the "primary impact" of the SEP be at the site or within the immediate geographic area where the alleged violation occurred.

⁴ See generally <https://www.epa.gov/ozone-pollution> (effects and causes of ozone pollution).

pollutants also reduces the overall risk to health and the environment from operation of the landfill's energy-generating activities. Nexus is established because this SEP addresses the impacts of the violations and overall exposure to pollutants with similar health effects.

A second question involved the defendant's agreement to implement an unusually large SEP project, valued at approximately \$16 million, in a case where the penalty was \$875,000. In this case, the value of this project was unusually large for several reasons: First, both the City and the County of Honolulu ("CCH") wanted to offset the high level of illegal emissions (nearly 14 *million* pounds of HAPs and VOCs) from the landfill. Second, CCH was also particularly interested in implementing a significant project to benefit the citizens of the Honolulu area – particularly those living in the vicinity of the Landfill – who were exposed to the landfill's excess emissions. Finally, CCH wanted to build a large power generating facility because of the sizeable long-term savings of taxpayer dollars that would be realized from the project.

Third-Party Reviews of the SEP Policy

This follows up on the question during the 1/26 discussion on SEPs for whether there are any third-party reviews or evaluations of the SEP Policy. There are a few assessments that are either narrowly-focused or broadly general, as follows:

- At the request of then-Representative John Dingell, the Comptroller General reviewed a non-SEP Policy settlement practice under Title II of the Clean Air Act, of accepting “alternate payments” to outside parties in lieu of penalties. Citing earlier opinions involving other agencies, the Comptroller General concluded that “EPA's power to ‘compromise, or remit, with or without conditions’ administrative penalties assessed under section 205 of the Clean Air Act as amended does not authorize EPA's alternative payment policy.” Opinion of the Comptroller General B-247155 (July 7, 1992). The text of the GAO’s decision is attached.
- In followup to the Comptroller General’s 1992 opinion, Representative Dingell requested the Comptroller General to review whether such alternative payments to outside parties was permissible under EPA’s 1991 SEP Policy (since superseded). The Comptroller General, citing its earlier opinion, confirmed that such payments were not permissible and would violate the Miscellaneous Receipts Act. Opinion of the Comptroller General B-247155.2 (March 1, 1993) (copy attached). Both opinions also discussed the importance of “nexus” or the relationship between a supplemental project agreed to in a settlement and the underlying violations and applicable statute when determining the extent of the Agency’s prosecutorial discretion.
 - In neither opinion was the Comptroller General questioning the type of projects that are permitted by the SEP Policy, but was focused principally on the payment of monies to third parties, which is not allowed under the Policy: specifically, the SEP Policy flatly and expressly prohibits projects in which money is paid to a third party (SEP Policy, § VI, “Projects Not Acceptable as SEPs”). The SEP Policy also includes an extensive discussion of additional legal requirements applicable to SEPs, including those for nexus, to ensure there is no impermissible augmentation of Congressional appropriations, and other legal requirements for a proposed project. (SEP Policy, § IV, “Legal Guidelines”). In addition, the Policy was developed with both the US Department of Justice as well as the Office of General Counsel, to ensure that all legal requirements applicable to SEPs are covered in the SEP Policy.
- Also attached are client newsletters from Barnes & Thornburg and Goodwin Procter on the updated 2015 SEP Policy. Both summarize the legal and other requirements for SEPs, and additionally both note the “win-win” advantages of SEPs for their clients in settlement of an enforcement action. While not a strict legal analysis of SEPs, they are illustrative of the defense bar’s perspective.

Text of Comptroller General Opinion B-247155 (July 7, 1992), available at <http://www.gao.gov/products/402023>

MISCELLANEOUS TOPICS Environment/Energy Natural Resources Air pollution Administrative settlement Authority The Environmental Protection Agency lacks authority to settle mobile source air pollution enforcement actions brought pursuant to section 205 of the Clean Air Act, as amended, 42 U.S.C.A. Sec. 7524 (West Supp. 1991), by entering into settlement agreements that allow alleged violators to fund public awareness and other projects relating to automobile air pollution in exchange for reductions of the civil penalties assessed against them.

The Honorable John D. Dingell Chairman, Subcommittee on Oversight and Investigations Committee on Energy and Commerce House of Representatives

Dear Mr. Chairman:

Your letter of December 13, 1991, requested that we examine whether the Environmental Protection Agency (EPA) has legal authority to settle mobile source air pollution enforcement actions brought pursuant to section 205 of the Clean Air Act (the Act), as amended, 42 U.S.C.A. Sec. 7524 (West Supp. 1991), by entering into certain settlement agreements. These settlement agreements allow alleged violators to fund public awareness and other projects relating to automobile air pollution in exchange for reductions of the civil penalties assessed against them. As explained below, we conclude that EPA does not have authority to settle these enforcement actions in such a manner.

Background

Prior to its amendment in 1990, section 211 of the Clean Air Act provided for the payment of specified civil penalties by persons who violated certain provisions of the Act regulating fuels. 42 U.S.C. Sec. 7545(d) (1988). Former section 211 further provided for the recovery of these civil penalties through judicial proceedings brought in the appropriate United States district court. Id. Under former section 211, the EPA Administrator was also authorized to "remit or mitigate" these penalties. Id.

According to documents supplied to us by EPA, the EPA developed a policy pursuant to the former section 211 whereby it would issue "Notices of Violations" to alleged violators of the fuels provisions and attempt to enter into settlements with these alleged violators in lieu of instituting judicial proceedings. Such settlements could include reductions in the penalties specified in the statute. Factors taken into account by the EPA in determining whether to reduce penalties included action taken by the alleged violator to remedy the violation.

In addition, the EPA in 1980 developed an "alternative payment" policy with respect to the fuels provisions of the Act, whereby alleged violators could receive reductions in their cash penalties if they agreed to pay for certain public information or other projects approved by the EPA relating to mobile source air pollution issues.¹ At the same time, EPA extended this alternative payment policy to penalties

¹ Examples of projects paid for by alleged violators have included an American Automobile Association training program to instruct high-school automotive instructors on the most recent emissions control technology and sponsorship by the alleged violator of public events to promote clean air, including marathons, bicycle races, fairs, airplane towing messages, and "Clean Air Days." See Attachment to Nov. 8, 1991 Letter from EPA Administrator William K. Reilly to Honorable John D. Dingell.

for violations of former section 203 of the Clean Air Act, 42 U.S.C. Sec. 7522 (1988), which, inter alia, prohibited tampering with emissions control devices. The section governing penalties for tampering violations-- former section 205 of the Act, 42 U.S.C. Sec. 7524 (1988)--did not explicitly authorize EPA to remit or mitigate penalties for tampering violations, but EPA justified its extension of the alternative payment policy to penalties for these violations on the ground that former section 205 did provide for EPA discretion in determining the penalty amount.

The Clean Air Act Amendments of 1990 (1990 Amendments), Pub. L. No. 101-549, 104 Stat. 2399, amended section 205 to establish new maximum penalties for a number of the mobile source violations of the Act. Section 228(c), 104 Stat. at 2508. The 1990 Amendments further established authority for the administrative assessment of certain civil penalties (including the penalties for fuels and tampering violations) by an order made on the record after an opportunity for a hearing. *Id.* The Amendments set forth various factors for EPA to consider in assessing these civil penalties. *Id.* In addition, the 1990 Amendments gave EPA power to "compromise, or remit, with or without conditions" any administrative penalty that could be imposed under section 205. *Id.*

Discussion

EPA asserts that its power to "compromise, or remit, with or without conditions," civil penalties assessed under amended section 205 of the Clean Air Act provides a sufficient legal basis for its practice of funding public awareness projects with civil penalties assessed. See Attachment to Nov. 8, 1991 Letter from EPA Administrator William K. Reilly to Honorable John D. Dingell (EPA Letter). EPA also attempts to justify its alternative payment policy on the ground that the funded projects further the goals expressed by Congress in sections 101 through 104 of the Clean Air Act. In particular, EPA points to section 103(a)(5), which requires EPA to "conduct and promote coordination and acceleration of training relating to the causes, effects, extent, prevention, and control of air pollution," and former section 103(f)(1)(B), which required the Administrator to seek "to improve knowledge of the short- and long-term effects of air pollutants on welfare." *Id.* We disagree with both of these arguments.

In two earlier decisions, we held that the Nuclear Regulatory Commission (NRC) and the Commodity Futures Trading Commission (CFTC) lacked authority to adopt enforcement schemes similar to EPA's alternative payment policy. 70 Comp.Gen. 17 (1990); B-210210, Sept. 14, 1983. Our 1990 NRC decision involved statutory language virtually identical to that in the provision EPA contends authorizes its alternative settlement policy. Section 234 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. Sec. 2282, gave the NRC power to impose civil monetary penalties, not to exceed \$100,000, and to "compromise, mitigate, or remit" such penalties. The NRC had requested our opinion whether this provision authorized it to permit a licensee who violated NRC requirements to fund nuclear safety research projects at universities or other nonprofit institutions in lieu of paying a penalty or a portion of a penalty. Like the EPA in this case, the NRC had pointed out that its enforcement proposal would further another statutory objective--in the NRC's case, its authority to award contracts to nonprofit educational institutions to conduct nuclear safety-related research.

We determined that the NRC's discretionary authority to "compromise, mitigate, or remit" civil penalties empowered it to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator, but that its authority did not extend to remedies unrelated to the correction of the violation in question. 70 Comp.Gen. at 19. Under the NRC proposal, we noted, a violator would contribute funds to an institution that, in all likelihood, would have no relationship to the violation and would not have suffered any injury from the violation. *Id.*

Moreover, from an appropriations law perspective, such an interpretation would have required us to infer that Congress had intended to allow the NRC to circumvent 31 U.S.C. Sec. 3302(b) and the general rule against augmentation of appropriations. *Id.* Section 3302(b) requires agencies to deposit money received from any source into the Treasury; its purpose is to ensure that Congress retains control of the public purse. *Id.* In our view, the enforcement scheme proposed by the NRC would have resulted in an augmentation of NRC's appropriations, allowing it to increase the amount of funds available for its nuclear safety research program. *Id.*

Neither the language nor the legislative history of section 234 of the Atomic Energy Act of 1954 provided any basis for an inference that Congress had intended to allow the NRC to circumvent these appropriations principles. Accordingly, we concluded that section 234 did not authorize the NRC to reduce civil penalties in exchange for a violator's agreement to fund nuclear safety research projects. *Id.* at 19-20.

Similarly, our 1983 CFTC decision involved the CFTC's proposal to accept a charged party's promise to make a donation to an educational institution as all or part of the settlement of a case brought under the prosecutorial power provided the CFTC by the Commodity Exchange Act, as amended, 7 U.S.C. Secs. 9, 13b (1976). B-210210, Sept. 14, 1983. Like the NRC, and the EPA in this case, the CFTC had argued that such settlement terms would aid in the accomplishment of another of the Commission's statutory functions--in the CFTC's case, the establishment and maintenance of research and information programs which assisted in the development of educational and other informational materials regarding futures trading. *Id.* We held, as we later did in the NRC case, that the CFTC was without authority to achieve its educational and assistance function through the use of settlement agreements exacted from the exercise of its prosecutorial power. *Id.* We see no basis for concluding that EPA's prosecutorial authority under section 205 of the Clean Air Act is any more expansive than that of the NRC or the CFTC.

Finally, EPA argues that Congress ratified its alternative payment policy when it amended section 205 of the Clean Air Act in 1990. See EPA Letter. We disagree. In support of its ratification argument, EPA quotes a single sentence in a report on the Senate's version of the Clean Air Act Amendments of 1990. *Id.* The sentence is: "The Administrator may continue to issue . . . [Notices of Violation] to alleged violators of Title II provisions and to settle such matters to the extent authorized by law . . ." (quoting S. Rep. No. 228, 101st Cong., 1st Sess. 125-26 (1989)).

The context of the sentence was a discussion of the new provision eventually added to section 205 of the Clean Air Act establishing authority for the assessment of civil penalties by administrative proceeding. The Senate report quoted by the EPA was simply making clear that the new provision allowing for the assessment of civil penalties by administrative proceeding "is not intended to preclude the Administrator from utilizing the informal notice of violation (NOV) enforcement process developed for fuels and certain other mobile source violations." See S. Rep. No. 101, 101st Cong. 1st Sess. 125 (1989).

The language quoted by the EPA indicates only that the Senate was aware that EPA had been utilizing this informal process of issuing notices of violation and settling the enforcement actions so instituted. The language does not give any indication that the Senate or the Congress as a whole was aware of the terms by which EPA was settling these enforcement actions. Accordingly, the language in the Senate report cited by EPA does not persuade us that Congress even knew about the EPA's alternative payment policy, much less ratified it. See, e.g., *Inner City Broadcasting Corp. v. Sanders*, 733 F.2d 154, 160

(D.C.Cir. 1984) (before court would find ratification, at threshold it must be shown that the Congress was "obviously aware" of the policy in question and consciously acted or did not act in response to that policy); *Arizona Power Pooling Assoc. v. Morton*, 527 F.2d 721, 726 (9th Cir. 1975), cert. denied, 425 U.S. 911 (1976)(congressional "[k]nowledge of the precise course of action alleged to have been acquiesced in is an essential prerequisite to a finding of ratification"). The EPA does not cite any purported evidence of congressional knowledge or acquiescence in the terms of its alternative settlements, and we are aware of none.²

Accordingly, we conclude that EPA's power to "compromise, or remit, with or without conditions" administrative penalties assessed under section 205 of the Clean Air Act as amended does not authorize EPA's alternative payment policy.

We hope our comments are helpful to you. In accordance with our usual procedures, we will make this opinion available to the public 30 days from its date.

² Indeed, Congress's addition in 1990 of a new subsection to the section of the Clean Air Act governing citizen suits demonstrates that had Congress intended to authorize the EPA to fund special projects with civil penalties assessed pursuant to section 205, it could have said so in much clearer terms. See Sec. 304(g)(1), 42 U.S.C.A. Sec. 7604(g)(1) (West Supp. 1991). The new subsection provides that penalties assessed in citizen suits shall be deposited in a special fund in the United States Treasury for use by the EPA Administrator to finance "air compliance and enforcement activities." The new subsection further requires the Administrator annually to report to Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof. *Id.* The specific language authorizing the funding of EPA air compliance and enforcement activities through penalties received by way of citizen suits stands in stark contrast to the language drafted by the same Congress in section 205, which merely states that EPA may "compromise, or remit, with or without conditions" administrative penalties imposed.

Keegan



Comptroller General
of the United States
Washington, D.C. 20548

DO NOT MAKE AVAILABLE TO PUBLIC READING
FOR 30 DAYS

B-247155.2

March 1, 1993

The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

This responds to your February 1, 1993, request that we review the December 28, 1992, response of the Environmental Protection Agency (EPA) to a July 7, 1992, General Accounting Office opinion, B-247155. In that opinion, we concluded that EPA's power to "compromise, or remit, with or without conditions," administrative penalties assessed under section 205 of the Clean Air Act, as amended, does not authorize EPA to enter into settlement agreements allowing alleged violators to fund certain public awareness and other projects relating to automobile air pollution in exchange for reductions of the civil penalties assessed against them.

EPA's December 28, 1992, letter states that EPA continues to believe that it has the legal authority to include these defendant-funded projects in settlement of enforcement actions. In this connection, EPA questions whether we considered its February 12, 1991, Policy on the Use of Supplemental Environmental Projects in EPA Settlements (the SEP policy) in developing our opinion.

We did consider EPA's SEP policy in developing our opinion in B-247155, and we continue to believe that certain projects allowed under that policy are not authorized by section 205 of the Clean Air Act, as amended. Based on two earlier GAO opinions, we held in B-247155 that EPA's discretionary authority to "compromise, or remit, with or without conditions," civil penalties assessed under section 205 empowers it to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator, but does not extend to remedies unrelated to the correction of the violation in question. See 70 Comp. Gen. 17 (1990); B-210210, Sept. 14, 1983.

EPA's SEP policy, which discusses the types of supplemental projects which will be considered acceptable for use in enforcement settlements, does require what it calls a

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"nexus" or relationship between the violation and the environmental benefits to be derived from several types of supplemental projects it permits. SEP policy at 5. For example, under the policy, the appropriate nexus would exist between an environmental restoration project which calls for the acquisition and preservation of wetlands in the immediate vicinity of wetlands injured by unlawful discharges, in order to replace the environmental services lost by reason of such injury.

However, the SEP policy also allows what it calls "public awareness" projects, and for these projects, no nexus at all is required. SEP policy at 4, 5. Therefore, these projects, which constitute the majority of supplemental projects approved by EPA in settlement of mobile source penalties under section 205,¹ can and do go beyond correcting the violation at issue. For example, a permissible project under the policy would be a media campaign funded by the alleged violator to discourage tampering with automobile pollution control equipment. SEP policy at 4. As under the proposal we held unauthorized in our earlier case, involving the Nuclear Regulatory Commission, here, the alleged violator would make a payment to an organization--the media selected to run the campaign--that, in all likelihood, would have no relationship to the violation and would not have suffered any injury from the violation. See 70 Comp. Gen. at 19. It is our view that the EPA's authority to compromise or remit civil penalties does not extend to imposing such remedies through settlement.

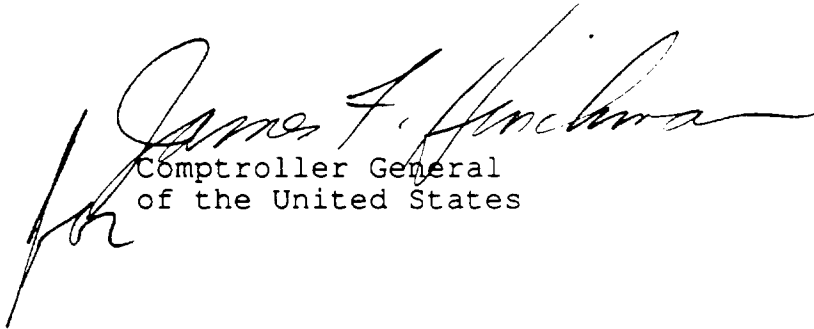
EPA also asserts that settlements involving these supplemental projects do not violate the Miscellaneous Receipts Act, 31 U.S.C. § 3302, since the cash portion of the penalty assessed goes to the Treasury. This argument misses the point. As we noted in an earlier opinion, allowing alleged violators to make payments to an institution other than the federal government for purposes of engaging in supplemental projects, in lieu of penalties paid to the Treasury, circumvents 31 U.S.C. § 3302, which requires monies received for the government by government officers to be deposited into the Treasury. B-210210, Sept. 14, 1983. In addition, as we pointed out in our other earlier opinion on this topic, concerning the Nuclear Regulatory Commission, an interpretation of an agency's prosecutorial authority to allow an enforcement scheme

¹See March 17, 1992, EPA Memorandum from Mary T. Smith, Director, Field Operations Support Division, to Scott C. Fulton, Deputy Assistant Administrator, Office of Enforcement, re: Office of Air and Radiation, FOSD Program Specific Alternative Payment Policy, at 2, 4.

involving supplemental projects that go beyond remedying the violation in order to carry out other statutory goals of the agency, would permit the agency to improperly augment its appropriations for those other purposes, in circumvention of the congressional appropriations process. 70 Comp. Gen. at 19.

We hope our comments are helpful to you. In accordance with our usual procedures, we will make this opinion available to the public 30 days from its date.

Sincerely yours,


Comptroller General
of the United States

ENVIRONMENTAL LAW

April 2015

Same Tune, New Steps: Dancing Through U.S. EPA's Update to its Policy on Supplemental Environmental Projects

Settling federal environmental enforcement actions is one of the most important environmental legal challenges faced by regulated entities, be they multi-national corporations, small family businesses, public institutions, individuals, or municipalities. Regulated entities seeking amicable and optimal settlements with the U.S. Environmental Protection Agency (EPA) and Department of Justice (DOJ) must navigate complex substantive and procedural issues, negotiate stipulated penalties, monetary penalties, response costs and damages, and injunctive relief, and always account for financial assurance, insurance, monitoring, potential third-party claims, and other requirements that structure the parties' post-settlement relationship. In short, the dance steps are multifarious and multifaceted - and your dance partner may not always appear to be the most coordinated or cooperative.

HIGHLIGHTS

EPA issues single repository for all Agency guidance and policies related to the use of SEPs in settlements of administrative and judicial enforcement actions.

Though it does not mark a substantial shift, the SEP Policy Update does helpfully consolidate all existing EPA guidance on the use of SEPs and provides pragmatic guidance on several detailed policy points.

The SEP Policy Update promises to be easier to implement during settlement negotiations - for both regulated entities and the federal government.

That said, one particular corner of federal environmental enforcement policy provides an opportunity to generate 'win-win' components of a settlement and create real environmental value for affected communities - Supplemental Environmental Projects (SEPs).

As explained by the EPA, a SEP "is an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action." As part of resolving either administrative or judicial enforcement actions, a defendant may perform a SEP to offset a portion of the monetary penalty imposed, and, in doing so, can redirect penalty funds from general federal coffers to confer real environmental benefit to the affected community and improve relations with regulators and the public.

SEPs have long been available in federal environmental enforcement settlements, however, EPA guidance and policies applicable to SEPs have historically been scattered throughout a number of interrelated (and not always seamlessly interlocking) documents issued by various offices over the past two decades. The underlying policies have been characterized by various connected and complicated analyses, distinct lines of DOJ and EPA approvals (both at the Region and Headquarters and from various program offices), different sets of required and precluded project characteristics, and tangential legal restrictions derived from both environmental and fiscal federal laws and regulations. With an already complicated policy further obfuscated by its embodiment in scattered Agency sources, SEPs are likely under-utilized.

This dispersion and diversion of Agency instruction on SEPs has, thankfully, come to an end.

On March 10, EPA's Office of Enforcement and Compliance Assurance (OECA) issued a memorandum entitled "[2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy](#)," (the "SEP Policy Update"). Lest there be any confusion, the SEP Policy Update does not fundamentally change the approval analyses or substantive requirements for acceptable SEPs. Nor does it change in any dramatic way the underlying dynamics that will render a SEP workable and desirable in a given settlement context.

The SEP Policy Update is framed as "[c]onsolidating the wealth of existing SEP guidance," and in that capacity alone it is of great value. The consolidation and organization of SEP policy and guidance documents is especially helpful on this issue because the possible use of SEPs in any given settlement is frequently only raised during more advanced stages of negotiation, and often in relation to specific monetary penalty proposals that EPA and DOJ choose to provide once other terms are negotiated. As such, delays or debates over how Agency policy should apply to potential SEP proposals can derail agreements or cause parties to abandon potentially fruitful, if administratively complicated, SEPs.

The SEP Policy Update goes further than simply collating existing documents; rather, it improves and explains Agency policy on SEPs in several important respects:

- For the first time, the SEP Policy Update specifically instructs EPA case teams to suggest SEP ideas to defendants and encourages more proactivity among EPA and DOJ attorneys in channeling community input on possible SEPs.
- The SEP Policy Update expressly identifies USEPA priority areas that should be targeted for favorable SEP treatment by the Agency, including children's health, Environmental Justice, pollution prevention, innovative technology, and climate change.
- There are robust and detailed (if somewhat overlapping) provisions related to SEP "implementers" and "recipients" – third parties that may, under certain circumstances, be involved in carrying out the SEP. As before, the settling party must always remain ultimately liable for SEP performance since the SEP will reduce the monetary payment that must be paid.
- More detailed respondent certifications relating to information provided about the SEP to evaluate its appropriateness and worth under the SEP Policy are explained and required in settlement documentation.
- The SEP Policy Update offers a nuanced menu of SEP stipulated penalty provisions and model settlement provisions that may be used to require a SEP in lieu of a monetary stipulated penalty as to compliance with other settlement agreement provisions in limited circumstances.
- The SEP Policy Update walks through issues arising from SEPs performed in multi-defendant cases and the implementation of interlocking SEPs required under separate settlements with distinct defendants.
- The SEP Policy Update retains and explains specific SEP policies applicable to particular types of cases, such as Clean Water Act settlements with municipal entities.

The SEP Policy Update is an important, if under-appreciated, achievement by EPA. Simply consolidating and tightening the diffuse and cumbersome universe of all relevant Agency policies related to SEPs is a boon to both regulator and regulated - it provides an authoritative source to guide SEP negotiations and hopefully expedite and encourage the use of this beneficial and dynamic enforcement settlement tool. Better still, the SEP Policy Update clarifies and hones the Agency's policies in several important ways that should render SEPs more targeted, impactful, accessible, and useful than ever before.

For more information, contact the Barnes & Thornburg attorney with whom you normally work, or one of the following attorneys: Robert Weinstock of the Chicago office at rweinstock@btlaw.com or 312-214-4854; Bruce White of the Chicago office at 312-214-4584 or bruce.white@btlaw.com; Charles Denton of the Michigan office at charles.denton@btlaw.com or 616-742-3974; Sean Griggs of the Indianapolis office at 317-231-7793 or sean.griggs@btlaw.com; or Jeffrey Longsworth of the Washington, D.C., office at 202-408-6918 or jeffrey.longsworth@btlaw.com.

You can also visit us online at www.btlaw.com/environmental.

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Environmental Law

Advisory

A monthly update on law, policy and strategy

Supplemental Environmental Projects – Creative Options For Directing Settlement Proceeds

For more than a decade, EPA has encouraged businesses and other entities charged with environmental violations to fund projects in lieu of payment of a portion of civil penalties that otherwise would be assessed in settlements of enforcement actions. Initially, these Supplemental Environmental Projects (“SEPs”) were applied predominantly in reporting violation cases, particularly to redress violations charged under the Emergency Planning and Community Right-to-Know Act. EPA has since adopted SEPs as an option in all program areas.

EPA promotes SEPs as a versatile tool for achieving significant environmental benefits, ideally of a kind desired and appreciated by the local community. In fiscal year 2001, EPA approved SEPs valued at over \$89 million and collected more than \$125 million in civil penalties. In other enforcement and compliance reports, EPA states that the value of the SEPs it has approved, as measured by the economic model it has mandated for that purpose, substantially exceeded the value of the civil penalties that they were used to offset.

For example, in April 2002, EPA announced a settlement under the Clean Air Act that included two SEPs, which it valued at \$2.64 million, together with a monetary penalty of \$775,000. The SEPs consisted of installing pollution control devices on Boston school buses and renovating a waterfront park. In January 2002, EPA announced a settlement in Indiana under the Clean Water Act that included a \$550,000 fine and a \$2 million SEP to reduce an industrial facility’s use and discharge of process water.

Witnessing these settlements, in which dollars have been invested in public projects widely reported in news media, state and local agencies

have followed suit. Most state environmental agencies and many local sewer, air and other authorities encourage SEPs as part of enforcement settlements. Although they look to EPA policies and settlements for guidance, these officials have their own enforcement priorities and budget constraints, and they may apply different standards in approving SEP projects and determining their mitigation value.

SEPs can provide regulated entities with attractive alternatives for reducing monetary penalties to settle environmental enforcement actions. At a minimum, SEPs offer options to invest in projects of the respondents’ choosing, rather than funding further government spending. In the right circumstances, other benefits may include improved public relations, energy efficiency gains, reduced material or waste disposal costs, better compliance programs, and increases in productivity.

SEPs, however, are not right for everyone. EPA requires that the economic costs and benefits of a proposed SEP be measured using its economic model, PROJECT. One purpose of PROJECT is to ensure that certain benefits to the respondent, such as tax advantages, are deducted from the total mitigation credit the respondent receives. Respondents also need to weigh costs not fully reflected in the PROJECT model, including the risks and expenses inherent in designing and implementing the SEP, and replacement costs outside the SEP implementation period.

This Advisory provides a brief introduction to EPA’s SEP policy, together with an illustrative comparison to state SEP programs across the country. It frames key issues to be considered at the outset of any negotiation where SEPs may be an option, including:

- how and when to use SEPs;
- what types of projects can be SEPs;
- how to calculate the penalty offset;
- criteria employed to evaluate SEPs; and
- how to maximize the monetary penalty reduction.

EPA SEP Project Policy

EPA's SEP Project Policy ("the Policy") defines SEPs and the limits on their use, describes acceptable categories of projects, prescribes the method for quantifying the amount of penalty mitigation allowed, and establishes penalties for noncompliance with an SEP implementation agreement.

Definition of SEPs

SEPs are projects voluntarily undertaken as part of settlements by respondents charged with environmental violations. In exchange for SEP performance, the respondent receives a reduction in the negotiated penalty amount. Investments in SEPs can be used only to offset a fraction of the overall penalty.

To meet EPA's definition of an SEP, a proposed project must be:

- environmentally beneficial;
- implemented entirely after the onset of the enforcement action; and
- not already mandated by law, unless the purpose of the SEP is to accelerate compliance with requirements not effective until at least two years after the date of the project.

EPA maintains national and regional "idea banks" which list projects that respondents may choose as SEPs. Although EPA does not provide any guarantee that a listed project will be approved, the idea banks may provide a cost-effective shortcut to an acceptable SEP that meets EPA's legal definition and requirements.

Legal Guidelines. A key requirement for any SEP is that it have a "nexus" to the violations alleged. Projects are also subject to the following restrictions:

- EPA cannot control or manage the SEP or its funds;
- the SEP must be memorialized in a detailed agreement that EPA can monitor and enforce;
- SEPs cannot be instituted to carry out responsibilities delegated or funded by Congress;
- responsibility and liability for instituting SEPs must be retained by the regulated entity; and
- information concerning the conduct and results of the SEP must be made available to the public.

Categories of SEPs. A proposed project must satisfy the requirements of at least one of the seven categories defined in the Policy. Examples of SEPs from each category are listed at <http://www.epa.gov/Compliance/planning/data/multimedia/seps/searchsep.html>. The benefits to respondents vary depending on the categorical type of project used.

CATEGORY	DESCRIPTION and <i>EXAMPLE(s)</i>
Public Health	Provide diagnostic, preventative or remedial health care <i>- Community medical treatment, therapy or studies</i>
Pollution Prevention	Reduce the amount or toxicity of pollution produced <i>- Modifications in technology or processes to eliminate or change materials or wastestreams</i>
Pollution Reduction	Reduce the amount or toxicity of pollutants released <i>- Improvements in recycling, treatment and disposal techniques</i>
Environmental Restoration and Protection	Improve the land, air or water at natural or man-made environments affected by the violation <i>- Conservation or remediation of resources not otherwise mandated by law</i>

Assessments and Audits	Examine internal operations to determine if other pollution problems exist or if operations could be improved to avoid future violations - <i>Pollution prevention or environmental quality assessments</i> - <i>Environmental compliance audits with a requirement to correct any discovered violations (typically approved only for small business or community)</i>
Environmental Compliance Promotion	Help other companies achieve compliance and reduce pollution - <i>Seminars, publications, training or technical support</i>
Emergency Planning and Preparedness	Assist state or local emergency response or planning agencies to fulfill their duties under the Emergency Planning and Community Right to Know Act - <i>Non-cash assistance such as training or equipment</i>

In considering which category of SEP to pursue, proponents should evaluate which may best fit their individual objectives and provide benefits beyond those accounted for by EPA. For example, the possibility of avoiding future violations, minimizing the impact of violations, satisfying stricter standards and saving money by increasing efficiency are all potential benefits that a proponent may obtain from undertaking projects in the pollution prevention, pollution reduction, and assessments and audits categories. Activities in the public health, environmental restoration, and emergency preparedness categories, by contrast, may provide the proponent with opportunities to strengthen community relations.

Penalty Mitigation

EPA permits a proponent to offset the estimated cost of an SEP against the total monetary penalty payable under EPA's enforcement policy for the alleged violations. EPA has established procedures for determining both the cost of the SEP and the percentage of that cost which the proponent may claim as a credit against the amount of the penalty.

EPA determines the net present after-tax cost of an SEP with its computer model PROJECT, which considers (i) capital costs, (ii) one-time nondepreciable costs, and (iii) annual operational costs and savings. PROJECT considers only the years in which the respondent is legally bound to perform the SEP and does not include any replacement cycles outside of that time period.

EPA has discretion to determine what percentage of the estimated cost – the mitigation factor – may be offset as a credit against the total penalty amount based on several criteria it uses to rate the proposed SEP. Criteria for determining the mitigation factor include benefit to the public, environmental justice, multimedia impacts, and pollution prevention. After determining the appropriate mitigation factor, EPA also may subtract the cost of any significant government resources that are used for monitoring.

The mitigation percentage cannot exceed 80% of the SEP cost, unless the proponent is a small business, government agency or nonprofit organization, or the project is an exceptional pollution prevention activity. In addition, the total credit given for an SEP cannot result in payment of a monetary penalty that is less than EPA's minimum criteria: the economic benefit of noncompliance plus 10% of the gravity component *or* 25% of the gravity component, whichever is greater.

EPA calculates the economic benefit of noncompliance with BEN, an after-tax, cash-flow model, which penalizes respondents for both the initial period of noncompliance and the assumed delay in replacing equipment in the future. The gravity component includes adjustments for factors in the penalty policy, such as audits and good faith.

Failure to Perform an SEP. Stipulated penalties for failing to satisfactorily perform an SEP range between 75% and 150% of the mitigation value originally awarded to the project. A proponent may avoid the penalty if good faith and timely efforts were made to complete the work *and* at least 90% of the funds budgeted for the SEP actually were spent. Overvaluing the cost of an SEP will also be penalized. Even if an SEP is successfully completed, a respondent must pay stipulated damages, between 10% and 25% of the original mitigation awarded, if the final cost of the SEP is less than 90% of the projected value.

State SEP Programs

Most states now have policies permitting the use of SEPs in enforcement settlements. These states generally look to EPA's SEP policy as a model, including its use of PROJECT to calculate SEP costs. The extent to which states will allow proponents to offset the cost of an SEP against the total penalty due varies. As indicated in the table below, states may cap the potential mitigation percentage below the federal level of 80% and may demand more SEP dollars to offset a single penalty dollar.

Jurisdiction	Maximum Mitigation
EPA	80%
Massachusetts	100%
New York	Unspecified
California	25%
Texas	50%

SEP policies vary widely across the country, and their application is further tempered by the prosecutorial discretion of each agency official and the constraints, including administrative budget pressures, under which that official must operate. A summary of formal policies adopted in four representative states, however, is provided below.

Massachusetts

The entire cost of an SEP in Massachusetts can be used to mitigate the monetary penalty as long as at least 25% of the penalty or the economic benefit gained from the violation, whichever is greater, is paid in cash. SEPs are allowed in Massachusetts only if a respondent can show that it has the financial ability to correct all noncompliance and has either already remediated any harm caused or is capable of doing so in the future. An SEP will not be allowed if its performance will impede a respondent's ability to comply or perform a remedial measure. While EPA gives priority to pollution prevention projects, Massachusetts places the highest value on resource conservation activities. The Massachusetts policy is available at <http://www.state.ma.us/de/en/enforce.htm#policies>.

New York

In 1995, New York issued a policy on Environmentally Beneficial Projects ("EBP"), the state's version of SEPs, available at <http://www.dec.state.ny.us/website/ogc/egm/ebp.html>. The state program does not establish a maximum mitigation percentage, but notes that some cash penalty must be included in the final settlement. The rest of New York's policy is similar to EPA's 1995 policy, but stricter in several ways. For instance, respondents in New York who commit a violation intentionally, knowingly or recklessly are not eligible for the EBP program. Similarly, respondents who failed to take all necessary steps to correct the violation, who caused a threat to the public health or grave environmental harm or who have a history of noncompliance will not be allowed to use EBPs to offset the monetary penalty. In addition, the state prohibits projects that a respondent would have undertaken anyway within the next *five* years, a period more than double that established by EPA.

California

The cost of an SEP in California can only mitigate 25% of the total penalty because the state wants to ensure that the final monetary penalty removes any unfair competitive advantage and economic benefits gained by the respondent's violation. The state's policy otherwise adopts EPA's program in virtually all respects, and is available at <http://www.calepa.ca.gov/Programs/enforcelensec9.htm>.

Texas

Credit for an SEP is limited to 50% of the total penalty assessed by Texas. Projects that either reduce pollution emissions or directly clean up environmental contamination may receive a dollar-for-dollar penalty reduction; otherwise, the average ratio in 2000 was \$1.20 in SEP dollars to mitigate \$1 of penalty. The Texas program is more flexible than EPA's Policy in several ways. For instance, Texas does not have a nexus requirement, but instead gives preference, and thus a higher mitigation ratio, to projects that directly benefit the environment of the community where the violation occurred. Similarly, Texas will accept a broad range of projects as SEPs, such as activities that promote public awareness of environmental matters, the cleanup of illegal municipal and industrial solid waste dumps that are unrelated to the violation or the respondent, and cash contributions to

ongoing programs or projects. Finally, Texas does not use stipulated penalties for the failure to expend funds budgeted for an SEP, but instead orders the money to be forfeited to the state's general revenue. The Texas policy is available at <http://www.tnrcc.state.tx.us/legal/sep/seppolicy.htm>.

Before beginning a settlement negotiation with a state agency, a respondent should understand the state's SEP policy and ask the relevant state agency for suggestions for acceptable projects. A familiarity with EPA Policy will be helpful because it inevitably serves as the starting point for each state's program. Respondents should look for differences regarding categories of projects, nexus, pricing and penalty assessment methodologies, and limits on mitigation percentages.

SEP Strategy

Before proposing an SEP, respondents should: (i) consider the benefits and costs of potential SEPs, (ii) decide what time commitment is practicable, (iii) calculate the costs of different projects using the appropriate economic model, and (iv) determine how to maximize mitigation credits. Throughout the process of developing an SEP, respondents will benefit from identifying and targeting the agency's preferred SEP categories and objectives.

Benefits and Restrictions of SEPs

There are many possible benefits of performing SEPs, including reduced monetary fines, efficiency gains, avoidance of future violations and positive publicity. Economic benefits within the scope of the PROJECT model, however, will be recognized and will reduce the overall penalty mitigation value. Committing to perform an SEP means that a company accepts (i) potentially long-term, non-transferable responsibility and liability for the project; (ii) public access to documentation about the SEP; (iii) continual acknowledgement on any publicity regarding the SEP that the project is part of an enforcement settlement; and (iv) the risk of stipulated penalties if an SEP is not completed in accordance with the settlement agreement.

Such limitations do not necessarily eliminate the value of an SEP to a respondent interested, for example, in building better relations with regulators and the affected community. However, a full cost-benefit analysis, taking into account

the risks, burdens, and duration of the legal and economic commitment, is necessary.

Length of SEPs

In choosing the length of an SEP, respondents must balance factors such as long-term commitment of resources versus immediate cash-flow requirements. Short-term SEPs are desirable if a respondent wishes to limit the length of its commitments but, under the PROJECT model, may result in reducing the net-present-value attributed to such projects. Projects from the following Policy categories tend to entail short-term commitments:

- Public health projects (unless continual treatment is involved)
- Assessments and audits
- Environmental compliance promotion
- Emergency planning and preparedness

If a respondent cannot pay the entire cost of an SEP immediately, then projects from the following categories may be preferable as they are often long-term:

- Pollution prevention
- Pollution reduction
- Environmental restoration and protection projects

Project lengths of more than 10 years cannot be incorporated into PROJECT, and EPA prefers activities that will be completed in under five years.

Cost of SEPs

Respondents must provide clear financial data, as any cost or benefit that is speculative will not be entered into PROJECT and thus will not be considered when evaluating the SEP's value. Because a minimum cash penalty is required, regardless of the value of an SEP, respondents should try to limit the cost of proposed projects to the amount that can receive mitigation credit. Accuracy in cost projections is crucial because over-estimating may result in stipulated penalties.

Maximizing Mitigation Credits

Respondents can increase the mitigation credit awarded an SEP by identifying significant public benefits provided and by choosing projects that are preferred by the pertinent agency or local

community. Projects that perform well on the following factors may achieve greater mitigation of monetary penalties:

- Pollution prevention
- Environmental justice
- Protecting or restoring ecosystems
- Innovativeness
- Community input
- Multimedia impact
- Minimizing government monitoring costs

Settlement discussions with regulators will progress more smoothly if respondents can clearly present the length, cost and public benefits of the proposed projects. Knowledge, initiative and careful economic analysis are crucial to obtaining the full benefit of any proposed SEP.

For additional information on Supplemental Environmental Projects, please contact:

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HR 732: “Stop Settlement Slush Funds Act of 2017” (Rep. Goodlatte)

HR 732 is “to limit donations made pursuant to settlement agreements to which the US is a party” and *prohibits*:

- Officials of the government to enter into or enforce any settlement directing or providing a payment to any person or entity other than the US.
- *Except* if the payment:
 - Provides restitution for or otherwise directly remedies actual harm (including to environment) directly and proximately caused by the defendant; or
 - Constitutes payment for services rendered in connection with the case.
- “Settlement agreement” covers civil and criminal matters.
- This is the latest permutation of recent legislative interest in curtailing payments and/or donations to third parties in federal settlements, based on belief that these terms reflect an overreach or misuse of the Executive Branch’s prosecutorial discretion and/or a usurping of Congressional appropriations powers.
- It differs from previous versions of such bills, in that it focuses solely on payments (not donations or contributions) and is more closely aligned with established legal precedent and EPA’s civil enforcement practice. In addition, the bill does not appear to prohibit payments defendant might choose to make to contractors or third parties, to implement their settlement obligations. However, additional clarifications may be helpful, *e.g.*, to establish that the prohibition on payments to third parties does not undermine settlements involving our State co-plaintiffs.
- This bill should not directly affect SEPs, since EPA’s SEP Policy prohibits cash donations. and EPA does not use settlements to create “slush funds,” or to direct cash donations to interest groups or third parties.
 - However, it may affect settlements with State co-plaintiffs, which sometimes involve payments to State funds or special trusts, to ensure and effect the implementation of appropriate projects to benefit communities in the State, as well as providing for the payment of a portion of civil penalties to the State. Under the language of the bill, a State may be considered an “entity other than the US.”
- Mark-up of HR 732 in the House Judiciary Committee was scheduled for 10am, Thursday, 2/2, but was not discussed during the session.

.....
(Original Signature of Member)

115TH CONGRESS
1ST SESSION

H. R. _____

To limit donations made pursuant to settlement agreements to which the
United States is a party, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. GOODLATTE (for himself, Mr. PETERSON, and [see ATTACHED LIST of co-
sponsors]) introduced the following bill; which was referred to the Com-
mittee on _____

A BILL

To limit donations made pursuant to settlement agreements
to which the United States is a party, and for other
purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Stop Settlement Slush
5 Funds Act of 2017”.

1 **SEC. 2. LIMITATION ON DONATIONS MADE PURSUANT TO**
2 **SETTLEMENT AGREEMENTS TO WHICH THE**
3 **UNITED STATES IS A PARTY.**

4 (a) **LIMITATION ON REQUIRED DONATIONS.**—An of-
5 ficial or agent of the Government may not enter into or
6 enforce any settlement agreement on behalf of the United
7 States, directing or providing for a payment to any person
8 or entity other than the United States, other than a pay-
9 ment that provides restitution for or otherwise directly
10 remedies actual harm (including to the environment) di-
11 rectly and proximately caused by the party making the
12 payment, or constitutes payment for services rendered in
13 connection with the case or a payment pursuant to section
14 3663 of title 18, United States Code.

15 (b) **PENALTY.**—Any official or agent of the Govern-
16 ment who violates subsection (a), shall be subject to the
17 same penalties that would apply in the case of a violation
18 of section 3302 of title 31, United States Code.

19 (c) **EFFECTIVE DATE.**—Subsections (a) and (b)
20 apply only in the case of a settlement agreement concluded
21 on or after the date of enactment of this Act.

22 (d) **DEFINITION.**—The term “settlement agreement”
23 means a settlement agreement resolving a civil action or
24 potential civil action, a plea agreement, a deferred pros-
25 ecution agreement, or a non-prosecution agreement.

26 (e) **REPORTS ON SETTLEMENT AGREEMENTS.**—

1 (1) IN GENERAL.—Beginning at the end of the
2 first fiscal year that begins after the date of the en-
3 actment of this Act, and annually thereafter, the
4 head of each Federal agency shall submit electroni-
5 cally to the Congressional Budget Office a report on
6 each settlement agreement entered into by that
7 agency during that fiscal year that directs or pro-
8 vides for a payment to a person or entity other than
9 the United States that provides restitution for or
10 otherwise directly remedies actual harm (including
11 to the environment) directly and proximately caused
12 by the party making the payment, or constitutes
13 payment for services rendered in connection with the
14 case, including the parties to each settlement agree-
15 ment, the source of the settlement funds, and where
16 and how such funds were and will be distributed.

17 (2) PROHIBITION ON ADDITIONAL FUNDING.—
18 No additional funds are authorized to be appro-
19 priated to carry out this subsection.

20 (3) SUNSET.—This subsection shall cease to be
21 effective on the date that is 7 years after the date
22 of the enactment of this Act.

23 (f) ANNUAL AUDIT REQUIREMENT.—

24 (1) IN GENERAL.—Beginning at the end of the
25 first fiscal year that begins after the date of the en-

1 actment of this Act, and annually thereafter, the In-
2 spector General of each Federal agency shall submit
3 a report to the Committees on the Judiciary, on the
4 Budget and on Appropriations of the House of Rep-
5 resentatives and the Senate, on any settlement
6 agreement entered into in violation of this section by
7 that agency.

8 (2) PROHIBITION ON ADDITIONAL FUNDING.—

9 No additional funds are authorized to be appro-
10 priated to carry out this subsection.